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July 2, 1984

Haid
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REGISTERED PATENT ATTORNEY

US EPA RECORDS CENTER REGION 5



404060

Assistant Attorney General
of the Land and Natural Resources Division
Department of Justice
Washington D. C. 20530

Re: United States of America
vs. Frank J. Kelley, et al.
U.S. District Court
Civil Action No. 80-73699
D.J. Ref. 90-7-1-120

Gentlemen:

Enclosed herewith please find City of Riverview's
Objections to, and Comments on Consent Decree in the above
captioned matter.

Very truly yours,

LOGAN, HUCHLA & WYCOFF, P.C.

Randall A. Pentiuk
OFFICE OF CITY ATTORNEY
CITY OF RIVERVIEW

RAP:kaj

Enc.

cc: Thomas M. Woods,
Attorney for BASF
Thomas J. Emery,
Asst. Attorney General

90-7-1-120

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LANDS DIVISION
SECTION 10-1-120

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

FRANK J. KELLEY, Attorney General
for the State of Michigan, FRANK J.
KELLEY, ex rel. MICHIGAN NATURAL
RESOURCES COMMISSION, MICHIGAN
WATER RESOURCES COMMISSION, and
RONALD SKOOG, Director of the
Michigan Department of Natural
Resources,

Civil Action No. 80-73699

HON. RALPH B. GUY, JR.

Intervenor-Plaintiffs,

-vs-

BASF WYANDOTTE CORPORATION and
FEDERAL MARINE TERMINALS, INC.,

Defendants.

OBJECTIONS TO, AND COMMENTS ON
THE CONSENT DECREE

The City of Riverview, a Michigan municipal corporation, by and through its attorneys, Logan, Huchla & Wycoff, P.C., and by the authority and direction of the Mayor and City Council, submits the following objections to, and comments on the proposed Consent Decree lodged with this Honorable Court in the within cause:

STANDING AND INTEREST OF THE CITY OF RIVERVIEW

The subject of controversy in this cause is hazardous waste located on a site known as the Federal Marine Terminal (hereinafter referred to as "F.M.T."). Inasmuch as the said site

is located within the geographical boundaries of Riverview, the City has an obvious and direct interest in the matter, both for itself and its residents.

This opportunity to address the City's concerns to this Court is of critical importance. At no stage of this matter prior to the finalization of the Consent Decree have the federal and state governmental agencies prosecuting the case consulted with or advised the City of their plans. At no point in this litigation have local concerns or interests been solicited by the plaintiffs. In short, those most immediately affected by the outcome of this matter, the City and its residents, have not been adequately represented by their state and federal governments. For this reason, this Honorable Court's most serious consideration of the following comments and objections is respectfully requested.

OBJECTIONS TO THE CONTAINMENT CONCEPT

The proposed Consent Decree is premised upon the assumption that containing hazardous wastes on site is an acceptable solution. Based on discussions with DNR officials, it is apparent that the theory of containment is that over a period of time the dangerous chemicals will slowly dissipate into the Detroit River. It is the City's view that allowing toxic

substances to leak into a major waterway is an unreasonable and unacceptable "solution" to the problem.

I. Magnitude of the Environmental Threat

In a study of surface water obtained from the F.M.T. site on December 8, 1979, it was discovered that there were "significant concentrations of some compounds found in the EPA Priority Pollutant (schedule).... The results from this analysis indicate that the water (is)... unacceptable for discharge to the sewer or the river...." Attached hereto, designated as Exhibit A, and incorporated herein by reference is the analysis results from this study.

A report prepared by the Canton Analytical Laboratory provides that analysis of samples taken on December 12 and 13, 1979, disclosed that:

"The subsurface water quality is extremely poor and is highly contaminated with cyanide, grease and oil, heavy metals, inorganic chemicals and organic chemicals. Many of the contaminants detected in the water analysis are widely recognized as toxic, or organoleptic and the concentrations of these chemicals are in excess of several different water quality criteria such as drinking water standards, water quality criteria for the protection of freshwater aquatic life, and discharge requirements to public sewers. It is not within the scope of this study to discuss whether the water at the site represents a human health hazard, but many freshwater aquatic organisms would be killed if exposed to the subsurface water at the Federal Marine Terminals site.

* * *

"Subsurface water quality is extremely poor with high pH, and high concentrations of COD, TOC, grease and oil, total solids, total volatile solids, total phosphorus, ammonia, sulfate, heavy metals, arsenic, cyanide and organic chemicals.

"Some of the constituents of the subsurface water are widely recognized as toxic or organoleptic.

"Several constituents, including those chemicals considered toxic or organoleptic, are in the subsurface water in concentrations in excess of criteria established for 1) primary drinking water, 2) protection of freshwater aquatic life, and 3) discharge to public sewers." Canton Analytical Laboratory Report, pages 17-18.

The Dames & Moore study reported that:

"The . . . report (Applied Environmental Research, 1979) included results of chemical analyses of fill, clay, and ground and surface water. Two samples of surficial fill material and one of clay showed high values of lead, nickel, mercury, grease and oil, and total volatile solids. Other constituents in the soil in significant quantities were arsenic, cadmium, zinc, chromium, copper, and polychlorinated biphenyl (PCB).

"Ground water samples collected for the study were taken directly from the bore holes using a metal bailing bucket; no piezometers were installed. One ground water sample contained high concentrations of total solids, total dissolved solids, and PCB that surpassed the U.S. EPA National Interim Primary Drinking Water Regulations (1977) for lead, arsenic, cadmium, and mercury. A composite of eight ground water samples was analyzed with a gas chromatography/mass spectrometer (GC/MS) for organic compounds. The GC/MS analysis was semi-quantitative and subject to the following limitations: detection level was one part per million (ppm) and did not include compounds amenable to vapor phase chromatography, solvent-extractable compounds, and compounds with molecular weights less than 80. Of the 25 compounds listed in the report, seven - toluene, naphthalene, fluorene, tetrachlorobiphenyl, pyrene, pentachlorobiphenyl, and tetrachloroethylene - are on the EPA Priority Pollutant list of compounds considered toxic to the environment. Three surface water samples taken on-site showed high pH, total solids, and total dissolved solids as well as significant arsenic and PCB concentrations." Dames & Moore Report, page 2 (emphasis added).

This same report found PCB and phenol concentrations in levels higher than the EPA criteria (Dames & Moore, page 11).

Soil studies show that "COB values in the soil are relatively high and would be considered highly polluted when compared to the EPA Sediment Classification," (Dames & Moore, page 13; emphasis added). The pH and total dissolved solids were above the EPA criteria, and concentrations of "chloride, sulfides, total kjeldahl nitrogen (TKN), and nitrogen as ammonia (NH₃-N) are high enough to exceed drinking water standards.... Ammonia and TKN are present in the soils in classifications high enough to classify the soils as heavily polluted...." (Dames & Moore, pages 13 and 14).

Moreover, the metals found on the site are in "concentrations... very high with respect to the EPA (1977) Guidelines... The fill would be considered moderately to heavily polluted based on the metals content." (Dames & Moore, page 14).

Comparisons between the F.M.T. site and Love Canal have been made which indicate that the problem in Riverview is worse in some respects. A comparative chart is attached hereto, designated as Exhibit B, and incorporated herein by reference.

In a letter to Congressman John Dingell dated February 20, 1980, Colonel Vermillion of the Army Corps of Engineers stated:

"On 5 November 1979 during a routine inspection of on-going construction by a Corps of Engineers employee, it was noted that surface water runoff and soils at the terminal site were discolored and possessed a strong "chemical" odor. The inspector also learned that sealed drums had been found and hauled from the site. The Corps of Engineers' District Office alerted the Michigan Department of Natural Resources (MDNR) to the possibility that a hazardous substance problem existed at the site. A joint inspection of the site by the Corps and MDNR on 7 November 1979 verified concerns that a problem existed.

"Chemical analysis of groundwater samples collected at the site revealed the presence of toxic waste, including PCB's, phenols, heavy metals, and other known carcinogens." (emphasis added).

In light of the foregoing, it is apparent that the F.M.T. site contains dangerous hazardous and toxic substances.

According to the analysis referenced above, several substances are on EPA's priority list. There is, without doubt, grave problems at this site. These problems have not improved or disappeared since tests were performed in 1978 and 1979.

The City objects to the containment theory for the reason that dangerous substances are in the land. To allow these chemicals to slowly seep into the river poses a serious threat to the environment; if the leakage rate is too fast, our ecology can be irreparably harmed.

Additionally, the containment theory assumes that all possible effects caused by this leakage are known today. This may be a dangerous and deadly assumption. If we later learn that the "slow leak" theory causes some problem which was unanticipated, it will be too late.

In sum, the City submits that the evidence shows that the problems at the F.M.T. site present potential harm to the environment if the substances remain. The only acceptable solution is complete removal of the toxic chemicals. To do less will risk our natural resources and perhaps, the health of our residents. Simply stated, the containment theory is not worth the risk.

II. Economic Development of Site

That the Consent Decree will have a detrimental effect upon the ability to develop and utilize the F.M.T. site is obvious. The significance of its impact can best be demonstrated by consideration of the following factors:

- *the F.M.T. site is approximately 30 acres in a city of only 4.4 square miles and a population of 14,600;
- *this property is one of last vacant deep water industrial sites in the Detroit-Toledo area;
- *it is located in a neighborhood consisting of 55% low and moderate income persons;
- *the unreasonable expectation that any prudent business would undertake development of a hazardous waste site for any meaningful or productive use of the land.

Clearly, the restrictions to be imposed on the F.M.T. site will mean a loss of potential jobs to Riverview's residents. It will leave dormant a valuable resource, that is, a deep water port, to the detriment of the City and entire downriver community. It also means lost tax revenues.

These adverse effects will continue well beyond the thirty year period set forth in the Decree. No reasonable business would consider assuming the risks and responsibilities inherent

in a toxic waste site, even after the expiration of the restrictions. This may well result in the land lying idle and wasted for several decades.

III. Other Ramifications

The problems created by the Decree do not end at the borders of the F.M.T. site. It has ramifications which impact upon the City and beyond. First, there is the obvious stigma which will attach to Riverview as another "Love Canal." This, in turn, will have a detrimental effect on property values.

Indeed, Firestone Tire & Rubber Company, which has a vacant plant immediately adjacent to the F.M.T. site, has filed a petition in the Michigan Tax Tribunal, Firestone v. City of Riverview, Docket No. 87139, seeking a \$2,500,000.00 adjustment to its assessment. Firestone's petition seeks this relief in part because of:

"(a) chemical dump site on the adjacent property, south of the specified property, currently restricted by the Michigan Department of Natural Resources, is a major depressing factor on property values in the immediate area."

It is expected that other taxpayers will seek similar relief, thus eroding the City's tax base.

An illustration of the dampening effect on other properties is the Firestone plant. In the Counsel Conference conducted in the tax appeal on June 13, 1984, Mr. Frank Williams of Firestone reported that prospective purchasers of the plant indicated grave

concerns about buying property next to the F.M.T. site. Those interested buyers have now gone elsewhere, apparently scared away by the hazardous waste site.

COMMENTS ON IMPLEMENTATION OF THE CONTAINMENT CONCEPT

Assuming, arguendo, that the concept of containment is an acceptable and reasonable solution to the hazardous waste problem, the issue becomes whether the plan for implementing it is satisfactory. From the local perspective, there are several aspects of the proposed plan which are wholly unacceptable. These areas of concern focus principally on economic development considerations which is of paramount importance since the F.M.T. site constitutes a significant part of the City's industrial zone and its last prime parcel of land.

I. Length of Plan

The proposed Consent Decree seeks to tie up the F.M.T. site for a period in excess of thirty years. See, e.g. "Maintenance of Site Modifications" on page 22; and "Restrictive Covenants Running With The Land" in Appendix F. This inordinate length of time represents nothing more than mere speculation of the plaintiffs as to the maximum time required for the wastes to slowly dissipate into the Detroit River.

A better approach is to establish a minimum period of time for restricting the site with extensions of time to be added as the need becomes apparent from the monitoring results. For

example, the minimum life of the restrictions might be ten years, with one year extensions to be added thereto if the test results warrant continued control of the site.

This aspect is of critical importance to the City. The longer the property is tied up, the more opportunities to turn it into productive land are lost. This, of course, means lost job opportunities in an area already plagued by high unemployment. It means lost tax revenue opportunities to the City. The longer the site is restricted, the longer the City and its residents must bear the stigma of having a hazardous waste area. As discussed above, this stigma affects the overall tax base, as property values decline.

In short, the City and its residents seek to be relieved of the burden imposed by the Decree at the earliest reasonable date. As presently drafted, the Decree ignores these concerns and, instead, sets an arbitrary period of time for the life of the plan. Since the site will be continuously monitored by the parties, a more rational approach is to adjust the period of time as conditions in the future require.

II. Area Restricted

Under the proposed Consent Decree, the entire F.M.T. site, consisting of approximately 30 acres, will be restricted and controlled (see Appendix A). Yet, after five years of exhaustive testing, it appears that only two portions of this property contains hazardous waste (See Appendix D). These two areas constitutes approximately ten to twelve acres and are to be

covered by the clay cap (see "Compacted Clay Cover," page 8). In other words, restrictions will be imposed upon the entire site even though only a third of the area requires control.

As a review of the map in Appendix D will disclose, the unaffected areas in the F.M.T. site are prime locations for development. These uncontaminated areas should, therefore, be excluded from the description of land governed by the Consent Decree in Appendix A.

III. Fencing Requirements

Similarly, the proposed Consent Decree requires a six foot fence around the perimeter of the entire parcel (see "Security of Site," page 5). This requirement, while perhaps reasonable in the contaminated areas, is overly broad when applied to the other two-thirds of the property. Security of the problem areas can be maintained without encumbering the entire site. Accordingly, the fencing requirement should apply only to the areas to be capped by clay as described in Appendix D; the balance of the land should be free for development.

It may be argued that the fencing requirement on the entire parcel has no correlation to development of the uncontaminated areas. In reality, though, the ominous six foot fence with three strands of barb wire around the property's perimeter will give the appearance of unavailability as well as the perception that all the land encompassed therein is contaminated. Such an impression is unnecessary and undesirable. Once imbedded, however, that impression will be difficult, if not impossible, to overcome.

IV. Sign Requirements

Even more devastating is the Consent Decree's sign requirements. Every one hundred feet, a sign must be posted stating:

WARNING

KEEP OUT

MANAGED INDUSTRIAL

WASTE DISPOSAL AREA

The letters on these signs must be at least 1 1/2 inches high. See "Security of Site," pages 4-5.

It is difficult to conceive of a more onerous burden to impose upon the City and its residents. Such a requirement will make reality all of the concerns about the stigma of having a hazardous waste site. One need only consider the impact "Love Canal" had on property values, tax revenues, and community development to realize the potential threat this requirement poses.

The six foot fence with three strands of barb wire provides sufficient security to the contaminated parts of the site. The added requirement that the defendant maintain this fence assures that this security will continue throughout the duration of the problem. In light of these factors, there is no legitimate reason for the signs. On the contrary, these signs will merely advertise and aggravate the City's problems caused by the containment plan.

If any signs are required, it would be sufficient that they read:

NO TRESPASSING

VIOLATORS WILL BE PROSECUTED

To require more will do irreparable harm to the reputation of the City by effectively labelling it another "Love Canal."

V. Clay Cover

As it is presently drafted, the proposed Consent Decree requires a two foot clay cover over the contaminated areas (see "Compacted Clay Cover," page 7). Although this may be an adequate depth of clay to carry out the containment plan, it is unsatisfactory for development. The City's consulting engineer advises that a minimum of five feet of clay is necessary.

This greater depth is required since the freeze depth is approximately four feet. Having a five foot clay cover will accommodate footings and foundations for any structures erected on the surface. Without the five foot depth, "new use" of the contaminated area will be restricted to a parking lot.

VI. Engineering and Construction Schedules

Under the proposed Consent Decree, work on this project is to be commenced immediately, see "Engineering and Construction Schedules," Appendix E. Most of the work is to be completed in 1984. It is apparent that vast sums of money will have to be expended in the near future.

As stated above, the City was not kept informed of this lawsuit by the plaintiffs. Consequently, there has been little opportunity to evaluate the plan from a community development

vantage point. Since entry of the Decree will have a dramatic impact upon the City and its residents, it would seem reasonable to give ample time for study and planning.

For this reason, the City requests that the completion dates contained in Appendix E be delayed for one year; to wit: 1985. The advantage of this delay in the actual work is that the City and the parties to this lawsuit may be able to work out modifications to the Decree to provide for meaningful use of the land. Without the delay, such modifications may not be possible since the defendant will have already expended large sums of money in compliance with the Decree. Moreover, delaying the construction will not prejudice any of the parties or have a negative impact upon the site.

RELIEF SOUGHT

The foregoing demonstrates the serious concerns of the City of Riverview with the proposed Consent Decree, and the valid reasons for those concerns. Under the statutes and regulations governing this cause of action, this Court may accept the proposed Consent Decree, reject it in its entirety, or may modify it. In light of the demonstrated adverse impact upon the City of Riverview and its residents, the Consent Decree should be rejected and a plan of complete removal of the hazardous wastes ordered or, at minimum, the Decree should be modified to lessen its negative effects. To do otherwise; that is, enter the

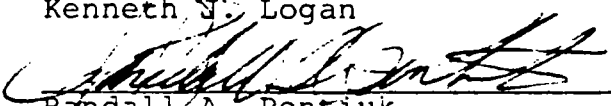
Consent Decree in its present form, will cause irreparable and serious harm to those most directly and immediately concerned: Riverview and its residents.

Respectfully submitted,

LOGAN, HUCHLA & WYCOFF, P.C.
Attorneys for the City of Riverview



Kenneth J. Logan



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(313) 283 - 5300

DATED: July 3, 1984

GC/MS Scan for E. P. A. Priority Pollutants

Sample 1

All priority pollutants below detection limits.

Sample 2

Phenol	60	ppb
Cresol	40	
Dimethylphenol	15	
Pentachlorophenol	90	
Anthracene or Phenanthrene	45	
Pyrene	50	
Fluoranthene	50	

Sample 3

Phenol	315
Cresol	250
Chlorophenol	12
Dichlorophenol	30
Dimethylphenol	100
Pentachlorophenol	600
Naphthalene	1400
Acenaphthylene	800
Acenaphthene	440
Fluorene	480

Anthracene or Phenanthrene	2100 ppb
Fluoranthene	1000
Pyrene	1100
Butylbenzylphthalate	170
Chrysene	970
Indenopyrene	30
Dibenzanthracene	25
Benzoperylene	40

Sample 4

All priority pollutants below detection limits.

CANTON ANALYTICAL LABORATORY

By: Peter W. Reishan
Peter W. Reishan
Laboratory Director

Concentrations in mg/l

*Quantity
p*

	<u>Love Canal</u>	<u>Drinking Water</u>	<u>Riverview</u>
Arsenic	130	50	<1000
Chromium, Total	270	50	550
Copper	540	1000	980
Lead	29	50	550
Mercury	-	2	<i>2</i>
Nickel	240	*	830
Zinc	480	5000	100
Iron	-	*	-
Cyanide	-	200	2100
Grease and Oil	-	15 mg/l	2570 mg/l
Phenol	30	1	1500
Dichlorophenol	10	*	30
EPA Priority Pollutants	17/128		12/132

ph.

*No standard available

*- 1st Sample collected from Drinking Water Zone
collected on 12/8/79*

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

FRANK J. KELLEY, Attorney General
for the State of Michigan, FRANK J.
KELLEY, ex rel. MICHIGAN NATURAL
RESOURCES COMMISSION, MICHIGAN
WATER RESOURCES COMMISSION, and
RONALD SKOOG, Director of the
Michigan Department of Natural
Resources,

Civil Action No. 80-73699
HON. RALPH B. GUY, JR.

Intervenor-Plaintiffs,

-vs-

BASF WYANDOTTE CORPORATION and
FEDERAL MARINE TERMS, INC.,

Defendants.

SUPPLEMENTAL COMMENTS ON
THE CONSENT DECREE

The City of Riverview, a Michigan municipal corporation,
by and through its attorneys, Logan, Huchla & Wycoff, P.C., submits
the following supplemental comments on the proposed Consent
Decree lodged with this Honorable Court in the within cause:

PROPOSED LAND USE

In the event that the containment concept as embodied
in the lodged Consent Decree is found to be an acceptable solution
in this matter, the City of Riverview has approached the parties
to this suit with a proposed land use which is consistent with the

principles underlying the clay cover plan. This proposal is the construction of a boat marina, with asphalt parking areas to be placed over the clay covers and is otherwise in conformity with the purpose and intent of the lodged Decree. A copy of the preliminary site plan is attached hereto.

Preliminary discussions with the environmental enforcement agencies have revealed no insurmountable objections or problems with the proposed land use. Yet it is recognized that plans must be finalized and detailed information provided before EPA and DNR can properly evaluate the proposal.

The defendant, BASF, has also indicated approval of the land use. It has expressed willingness to spend the funds it had allocated for the site to develop the proposed land use, assuming the plaintiffs approve the plans.

This proposed land use resolves the City's primary concerns for economic development of the site. It will avoid the blight created by the land lying dormant, and the residual problems discussed in Riverview's original "Objections to, and Comments on the Consent Decree."

AMENDMENT TO APPENDIX E IS NECESSARY

To make the City's proposal work, or at least allow the parties time to evaluate it, Appendix E, "Engineering and Construction Schedules," must be modified to set the deadlines for 1985, instead of 1984. Unless the dates are changed to 1985, BASF will be required to immediately expend large sums of money to comply with the Decree.

BASF will have to spend several hundred thousand dollars to buy clay and bring it on site. Yet, if the boat marina concept is approved, an ample supply of clay will be available from the site itself, as there will be excavation required for the boat canal. In short, a substantial portion of the funds will have been expended unnecessarily, due to the rigid schedule under the existing Appendix E.

If, on the other hand, the construction dates were changed to 1985, the excavated clay could be used for the cover over the contaminated areas. The savings derived therefrom could be spent more productively in developing the balance of the marina and its amenities.

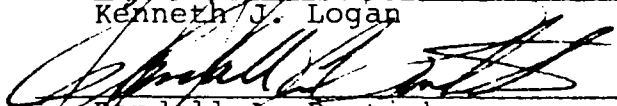
For this reason, the City has prepared and sent to the parties the attached "Stipulation for Modification to Consent Decree." The stipulation merely sets the construction deadlines back one year; to wit: 1985. It does not modify any other part of the Consent Decree.

There has not been sufficient time, though, for the parties to review the stipulation and execute it. Accordingly, the City of Riverview respectfully requests that the Court delay entry of the lodged Consent Decree to allow the parties time to evaluate, execute and file the aforementioned stipulation.

Respectfully submitted,
LOGAN, HUCHLA & WYCOFF, P.C.
Attorneys for the City of Riverview

By: 

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DATED: July 5, 1984